No. 87-1073 (8)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RUSSELL T. THOMPSON and
LOIS L. THOMPSON, his wife,

Petitioners

v.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; CORPORAL RONALD PROUGH, Supervising Officer of the Pennsylvania State Police, Individually and in his official capacity and
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE,

Respondents

BRIEF IN OPPOSITION

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QUESTION PRESENTED

On the facts of this case, did the courts below correctly decide that the conduct of the respondents was not "outrageous" within the meaning of United States v. Russell, 411 U.S. 423 (1979)?

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STATEMENT OF THE CASE

1. This is a civil rights action arising out of an undercover drug investigation by the Pennsylvania State Police. Petitioner Russell T. Thompson seeks damages from the respondents, Trooper Lucinda Hammond and Corporal Ronald Prough of the State Police, on the theory that they violated his constitutional rights by entrapping him into committing a crime.

2. In 1980, the State Police began an undercover investigation of petitioner, then employed as a police officer by the Borough of Carlisle, Pennsylvania. The investigation was begun at the request of the Carlisle chief of police, and was carried out by Trooper Hammond, under the supervision of Corporal Prough. Pet. App. 1a, 8a.

Trooper Hammond, working undercover, met with Thompson on a number of occasions in 1980 and 1981. On these occasions, they repeatedly discussed drugs, and Thompson's purported ability to obtain drugs. On March 23, 1981, Thompson obtained 4.5 grams of marijuana and gave it to Trooper Hammond. He was arrested and charged with unlawful delivery of a Schedule I controlled substance, and conspiracy. Pet. App. 2a, 8a.

Thompson's defense was that Trooper Hammond had entrapped him. He raised this issue in pre-trial motions which were denied. He raised it again at trial, but was convicted by a jury. He raised it yet again in post-trial motions, but these also were denied. Pet. App. 2a, 9a.

On appeal, however, a three-judge panel of the Pennsylvania Superior Court reversed. The two judges of the majority held that there had been entrapment as a matter of law. The other judge dissented, adopting the opinion of the lower court, and would have held that there had been no entrapment. Commonwealth v. Thompson, 335 Pa. Super. 332, 484 A.2d 159 (1984); Pet. App. 2a-3a, 9a-10a.

In the meantime, the Borough of Carlisle suspended and then fired petitioner as a police officer. Petitioner appealed to the Borough's Civil Service Commission, but at his request, his hearing was delayed until after the disposition of the criminal charges. Pet. App. 8a-9a.

At some time before the hearing, however, petitioner was arrested and convicted of soliciting a prostitute, as a result of which he decided not to seek reinstatement as a police officer.[1] Pet. 9a. In addition, the Borough in the meantime had re-hired petitioner in a non-police capacity, so that the only remaining issue in his civil service appeal was his claim for back pay for the five-month interval during which he was unemployed. Ibid. After a hearing, the Civil Service Commission denied petitioner's request for back pay, and

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[1]Petitioner's statement that he was "not able" to recover his job "despite recourse to the local Civil Service Board," Pet. 8, is thus misleading.

petitioner did not appeal that decision. See Pa. Stat. Ann., tit. 53, § 46191 (Purdon 1986 Supp.)(right of appeal to court of common pleas).

3. The District Court granted the respondents' motion for summary judgment on all of petitioner's claims.[2] Petitioner's primary claim, and the only one before the Court, was that the respondents had violated the due process clause by entrapping him. In rejecting this claim, the District Court recognized that entrapment does not

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[2]In addition to the claim discussed in his petition, Thompson asserted a procedural due process claim and a claim based on a constitutional version of abuse of process. The District Court granted summary judgment to the defendants on these claims as well, Pet. App. 4a, n., and the Court of Appeals affirmed, Pet. App. 18a-20a. Petitioner has not pursued these claims in this Court.

ordinarily present an issue of constitutional dimensions, but that this Court had nevertheless left open the theoretical possibility that police misconduct could be "so outrageous that due process principles would absolutely bar. . . a conviction." Pet. App. 4a, quoting United States v. Russell, 411 U.S. 423, 431 (1973).

On the assumption that the same analysis would apply in a civil rights action, the District Court applied the Russell standard to the facts of this case and held that the respondents' conduct had not reached the "level of outrageousness sufficient to constitute a due process deprivation." Pet. 5a. The Court of Appeals, following the same analysis, affirmed. Pet. App. 11a-18a.

ARGUMENT

1. According to the petitioner, the questions in this case are 1) whether police entrapment can serve as the predicate for a civil rights action and 2) if so, what standard governs such an action? Pet. i. Neither of these questions, however, is properly before the Court, because neither was addressed by the courts below or raised by any party.

In the courts below, the respondents assumed, for purposes of summary judgment, 1) that police entrapment could give rise to a civil rights cause of action and 2) that such an action would be governed by the "outrageous conduct" standard of United States v. Russell, supra. As the petitioner concedes, the lower courts proceeded on

the same assumptions. Pet. 9; Pet App. 15a ("While the due process aspect of entrapment has not yet been brought before the Supreme Court in an action under 28 [sic] U.S.C. § 1983, presumably the same [Russell] analysis applies."). Petitioner did not, of course, challenge the first of these assumptions. Nor did he, then or now, challenge the second; petitioner has always conceded that the "outrageous conduct" standard is the appropriate one. Pet. 15 ("Court is asked to decide whether the law recognizes a civil cause of action based upon outrageous police investigation techniques ...."). Petitioner cannot ask the Court to decide questions which the courts below resolved, at least provisionally, in his favor.

2. The only question that could properly be before the Court is whether the courts below correctly determined that the respondents' conduct was not "outrageous" under Russell. The application of an unchallenged general standard to the facts of a particular case is not, however, a matter that justifies discretionary review by the Court, and petitioner has offered no other reason--such as a conflict among the circuits--that would justify review.

CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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